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United States Postal Service *and* National Association of Letter Carriers Branch 11. Cases 13–CA–097568, 13–CA–097606, and 13–CA–098060

April 24, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

On November 13, 2013, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions²

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by having the police eject employee Darion Williams, and by suspending and terminating Williams, we do not find that *Coca Cola Puerto Rico Bottlers*, 358 NLRB No. 129, slip op. at 3 fn. 12 (2012), stands for the proposition that the third factor of the *Atlantic Steel* analysis is the most important. *Atlantic Steel Co.*, 245 NLRB 814 (1979). In addition, with regard to that factor, we do not rely on *Plaza Auto Center*, 355 NLRB 493, 497 (2010), which is before the Board pursuant to a remand by the United States Court of Appeals for the Ninth Circuit. *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286, 289 (9th Cir. 2011).

The Chairman and Member Hirozawa agree with the judge, for the reasons he states, that all four Atlantic Steel factors favor Williams' continued protection in this case. Member Johnson concurs in finding the violation, but finds that the third Atlantic Steel factor-nature of the outburst-weighs against continued protection here, given Williams' repeated refusals to return to his workstation, moving in closer to Supervisor Candida Brewer and pointing his finger at her, and the loud interaction. Nonetheless, given that the other three factors clearly weigh in favor of finding that Williams did not lose protection of the Act, Member Johnson agrees that Respondent's ejection, suspension, and discharge of Williams violated Sec. 8(a)(3). See Kiewit Power Constructors Co. v. NLRB, 652 F.3d 22, 27 fn. 1 (D.C. Cir. 2011) ("It is possible for an employee to have an outburst weigh against him yet still retain protection because the other three factors weigh heavily in his favor."). The Chairman and Member Hirozawa agree with Member Johnson that even under his view that the third factor does not weigh in favor of protection, Williams' conduct remained protected based on a balancing of all four factors.

and to adopt the recommended Order as modified.³
ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United States Postal Service, Harvey, Illinois, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

- 1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.
- "(c) Compensate Darion Williams for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters."
- 2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 24, 2014

Mark Gaston Pearce,	Chairman
Harry I. Johnson, III,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

³ We shall order the Respondent to compensate Williams for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. We shall substitute a new notice to conform to the Order as modified.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT have the police remove you from the facility, suspend, discharge, or otherwise discriminate against you because you engage in activities in support of the National Association of Letter Carriers Branch 11 (the Union).

WE WILL NOT threaten you with being removed from the facility by the police, more stringent enforcement of work rules and policies, discipline, or any other adverse action because you engage in activities in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Darion Williams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Darion Williams whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL compensate Darion Williams for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board Order, remove from our files any reference to our unlawful police removal, suspension, and discharge of Darion Williams, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the removal, suspension, and discharge will not be used against him in any way.

UNITED STATES POSTAL SERVICE

Kevin McCormick, Esq., for the Acting General Counsel. Rebecca R. Horan, Esq., for the Respondent. Michael Caref, Vice President, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case arises out of a May 9, 2013¹ order consolidating cases, consolidated complaint and notice of hearing stemming from unfair labor practice (ULP) charges that the National Association of Letter Carriers Branch 11 (the Union) filed against the United States Postal Service (the Respondent), concerning conduct at the Harvey, Illinois post office (the facility).

I conducted a trial in Chicago, Illinois, on August 14 and 15, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

- (1) On January 25, did Supervisor Candida Brewer threaten to call the police on new Steward Darion Williams, a letter carrier (or mail carrier), to remove him from the facility, because he was attempting to perform steward duties pertaining to a grievance?
- (2) On January 29, was Brewer justified in having the police eject Williams from the facility because his conduct as a steward earlier that morning lost the protection of the Act?
- (3) Did the Respondent have good cause on January 29 to place Williams on nonpay emergency placement status (suspension) for the same reason?
- (4) Did the Respondent have good cause to issue Williams a February 13 notice of removal (termination)?
- (5) On the morning of January 29, following Williams' removal from the premises, did Brewer, at a "plan 5 meeting" (service talk), threaten employees with (a) discipline, (b) stricter enforcement of rules and policies, and (c) surveillance, because they had elected Williams as steward?
- (6) Did Postmaster Lisa Thomas, at the same meeting, threaten employees with discharge or other adverse action for engaging in union activities?

Witnesses and Credibility

Testifying for the Acting General Counsel (the General Counsel) were Williams and fellow letter carriers Steven Harris (a former union steward), Tommy Hayes, Willie Rayborn, and Leland Young.

The direct testimony of Harris and Hayes was not included in the transcript and could not be retrieved by the court reporting service. Rather than re-take their testimony, the parties

¹ All dates are in 2013, unless otherwise indicated.

agreed to stipulate what questions the General Counsel asked them, and their answers, at the trial.²

The Respondent's witnesses were Brewer and Thomas; letter carriers Leslie Anderson, Yolanda Finch, and Timothy Windom; and sales and service associate (and rank-and-file employee) Mark Stancy.

In regard to credibility, I cite at the outset the well-established precept that "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). The trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 797–799 (1970).

I conclude that Brewer was not credible on many key matters, based on my observations, portions of her testimony that were inconsistent or not believable, and the contrary testimony of other witnesses. As far as demeanor, Brewer appeared to excessively dramatize the events of January 25 and 29 and to exaggerate how Williams' conduct on January 29 was threatening and caused her fear and anguish. I note that she struck me as having a strong personality and not being easily intimidated, Following are flaws in her testimony.

Although Brewer testified that she told Williams in their January 25 meeting that he had to first file a grievance before he could ask for an extension, she testified on crossexamination that a steward does not have to first file a grievance but can ask for an extension if he or she cannot file the grievance within the 14-day contractual time limit. She offered no explanation for this inconsistency. Further, Brewer testified that Williams "yelled" at her during the meeting and that they both spoke equally loudly to each other.³ On the other hand, Williams and Assistant Steward Rayborn, who was also present, characterized Brewer as more aggressive, and their depiction was indirectly corroborated by Finch (a witness for the Respondent), who was in the vicinity of the conversation. Finch testified that the volume of Brewer's voice was between normal and loud and that she heard Brewer make specific statements but could not hear anything that Williams said. Finally, Brewer herself testified that Williams' conduct was not threatening that day. I therefore credit Williams and Rayborn's testimony over Brewer's.

As to how far away from her Williams was on January 29, when he stood over the front of her desk, leaned over, and pointed at her, Brewer testified "arms length" but then said "five inches." The two distances cannot be reconciled. In this regard, Stancy (another witness for the Respondent) testified that Williams was "not real close a couple of feet away," and I credit him.

Brewer equivocated on cross-examination when asked if she asked Williams on January 29 if he had any grievances to file: "I may have. I don't know, yeah. I asked him what is the grievance about." 6

Brewer testified that when she called Postmaster Thomas on January 29, she told her that "a carrier" had been removed. When asked if she mentioned Williams by name, she answered, "I don't even remember I may have said Mr. Williams. I don't know." In view of the gravity of the situation, and her testimony that she had never before had an employee removed from the facility, I find this professed lack of recall highly unconvincing. Indeed, Thomas testified that Brewer told her she had to call the police because Williams was threatening her.

Brewer professed to have a very sketchy recollection of what she and Thomas said at the January 29 service talk, in marked contrast to her detailed recitation of what occurred in her meetings with Williams on January 25 and 29. This is especially suspicious in light of the fact that the service talk took place very shortly after Williams was escorted out of the facility. In this regard, it is undisputed that, during the meeting, Rayborn asked what an employee should do if the supervisor was wrong, and Brewer conceded that she construed this question as relating to what had happened to Williams earlier that morning.

On January 31, Union Secretary Elise Foster attended Brewer's disciplinary interview with Williams, as Williams' union representative. Brewer's testimony that at the time she thought that Foster, as the secretary, was a clerical employee who "sit[s] and answer[s] the phones" rather than a union official, was unbelievably naïve coming from a postal service supervisor of 6 years.

Turning to Williams, he appeared to downplay the degree of confrontations that he had with Brewer on January 25 and 29, but not to the extent that Brewer overstated them. His testimony was generally consistent and plausible, with two exceptions.

The first was his assertion (on cross-examination, not on direct examination) that on the morning of January 25, he called Brewer and told her that he was coming in to the facility about a grievance on which time was running out, and she said okay. Yet, both he and Brewer, and Rayborn all agree that when he arrived, she refused to have any kind of discussion about grievances but instead told Williams that he should not be at the facility because he was on vacation. This would have been totally inconsistent if, as Williams testified, she had given him prior approval to come in for that purpose.

The second concerns what both Williams and Brewer agree he told her at the January 29 meeting; that she could not give him direct orders because he was a nonbargaining unit employee. At trial, he could not offer a satisfactory explanation of why he stated that, conceding that a direct order is "essentially the same" as an instruction. How he could characterize himself as a nonbargaining unit employee when he was acting as a steward is perplexing.

² Jt. Exhs. 7 & 8.

³ Tr. 260, 261.

⁴ Tr. 281.

⁵ Tr. 404.

⁶ Tr. 347.

⁷ Tr. 354.

⁸ Tr. 356.

⁹ Tr. 61, 103.

Nevertheless, as between Williams and Brewer, I find far fewer flaws in his testimony and generally credit him where his testimony diverged from hers.

Concerning the January 29 service talk, I previously noted that Brewer's account was suspiciously sketchy and conflicted with Thomas'. In this respect, none of the three carriers that the Respondent called to testify about the service talk offered much in the way of specifics of what was said. Thus, Finch and Windom testified that they had no recollection whatsoever, and Anderson recalled only that Brewer stated that Thomas was her boss, and she had to follow her instructions, and that Brewer was the employee's boss, and they had to follow her instructions.

In contrast to the Respondent's witnesses, Harris, Hayes, Rayborn, and Williams all testified consistently (but not identically—adding to their credibility) about what Thomas and Brewer said at the meeting. They testified that Brewer stated that the employees wanted change and would now get change in that management would now start more stringently enforcing work rules and disciplining employees who violated them. They all also testified that Thomas stated that she could fire them but that they could not fire her. I note here that Harris' testimony is not automatically discredited because he is in suspension status, particularly when it is corroborated by other witnesses.

Thomas testified that she could not recall to what the meeting pertained but that she stepped in after the employees were "unruly and disrespectful" and talked over Brewer. ¹⁰ Not one other witness corroborated Thomas on this, greatly undermining her credibility.

Another aspect of Thomas' testimony that wholly lacked credibility was her claim that she had no knowledge prior to January 29 that Williams was the new steward, even though he was elected on January 17. I cannot comprehend that Thomas, as the highest-ranking management official at the facility, would not have known this earlier.

Accordingly, I credit the accounts of the General Counsel's witnesses of what Thomas and Brewer said at the meeting.

Other credibility resolutions will be discussed during my recitation of the facts.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

Background

The Respondent provides postal services for the United States and operates various facilities throughout the country, including the facility. The Board has jurisdiction over the Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Act.

A nationwide collective-bargaining agreement between the Respondent and national Union has at all times material been in effect. 11 Relevant portions of pertinent provisions follow.

Grievance/arbitration provision—article 15, section 2, provides that either an aggrieved employee or the Union may initiate the first step of the grievance procedure, informal step A, a discussion between the aggrieved employee and his or her immediate supervisor within 14 days of the triggering event; if not resolved, the Union can file a written appeal to the formal step A. ¹² In January, Brewer was the supervisor who met with the union steward at the first step.

Disciplinary procedure—article 16, provides for the following steps: oral discussion, letter of warning, suspension of 14 days or less, and suspension of 14 days or more or discharge. ¹³ One of the just cause grounds for discipline is insubordination.

Representation—article 17, provides, inter alia, that the Union certify in writing a steward or alternate stewards; that stewards shall request and not unreasonably be denied permission to leave his or her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance.¹⁴ The article says nothing about the right of a steward to engage in steward activities at the facility when he or she is off duty.

Of the approximately 25–30 employees at the facility, about 20 are in the unit. The facility has three supervisors, who report to Postmaster Thomas. Brewer, the first-shift supervisor, has been at the facility for approximately 2-1/2 years and a postal service supervisor for about 6 years. Art Moore is one of the other two supervisors.

Williams was a letter carrier at the facility from July 2005 until February 13, when he was terminated. Prior to January 17, Vanessa Hotchkiss was the steward. On that date, Williams was elected to the position, and he officially became the steward on January 21. Thereafter, he twice engaged in steward activity and interfaced with Brewer, on January 25 and 29. He appointed Rayborn as his assistant steward.

Williams had disciplines prior to January, including three that were referenced in his notice of removal dated February 13:¹⁵ a 7-day suspension issued by Brewer on July 16, 20102, for failure to perform assigned duties; a 14-day suspension issued by Moore on October 9, 2012, for failure to obey instructions; and a removal noticed issued by Brewer on December 13, 2012, for failure to report an accident or incident in a timely matter. ¹⁶ The first was the subject of an arbitration award, which was not submitted to me, so its disposition is unknown. The second and third remain in the arbitration process.

Accordingly, this record contains nothing showing the merit or lack of merit of any of the disciplines that the Respondent imposed on Williams prior to his becoming union steward. In any event, the Respondent's counsel stipulated that the events that occurred on January 29 formed the sole basis for Williams' termination.¹⁷

¹⁰ Tr. 372.

¹¹ See Jt. Exh. 2.

¹² Ibid.

¹³ Jt. Exh. 3.

¹⁴ Jt. Exh. 4.

¹⁵ GC Exh. 3.

¹⁶ R. Exhs. 3–5.

¹⁷ Tr. 16

January 25 Incident

At about 10 a.m. on January 25, Williams and Rayborn, who were both on vacation and therefore in nonduty status, went to see Brewer. They entered through the back door and proceeded to her desk, located on the workroom floor. Based on the subsequent exchange between Brewer and Williams, as related by both them and also by Rayborn, I credit Brewer that Williams did not call her earlier that morning and tell her that he wanted to meet with her about a grievance. Williams, Rayborn, and Brewer gave varying but generally not drastically different accounts of what was said at the meeting. Where two of them were similar in their accounts vis-à-vis the third, I credit them. Thus, I credit Williams and Rayborn (implicitly corroborated by Finch) over Brewer and find that Brewer was more vociferous than Williams during their conversation. Further, neither Brewer nor Williams testified that the former said that Williams and Rayborn should not have come in through the back door (contrary to Rayborn's testimony), and I find that she did not. Therefore, I need not address any policies or practices regarding employees' use of the back door, either when off duty or otherwise.

Williams began by asking Brewer if she would meet with him to file a grievance for a named letter carrier 18 or grant him an extension because time was running out (the 14-day contractual time limit cited earlier). Brewer replied no, that she would do neither because he was on vacation and not on the clock. She further stated that he could not get an extension unless he had already filed the informal step A grievance. Williams continued to persist that she either meet with him or give him an extension. Brewer, who was seated at her desk, got up from her desk and approached them. She told them that she was giving them a direct order to leave the building, or she would call the police. When they did not leave, Brewer repeated once or twice that she was giving him a direct order to leave. Williams characterized her demeanor as "kind of aggressive," 19 and Rayborn stated that she raised her voice but that they did not. As earlier noted, Finch's testimony indirectly supports them.

Rayborn then told Williams that they should leave, and they did so. Brewer issued no discipline to either of them, and she testified that she did not call the police because Williams left the building and was not threatening that day. The January 25 incident is nowhere mentioned in the notice of removal.

Based on the testimony of various witnesses, both of the General Counsel and of the Respondent, I find that the policy and practice is that off-duty employees can come to the facility and at that time request permission from the supervisor to engage in a variety of activities, such as retrieving keys or a personal telephone, checking personal mail, dropping off a doctor's note, picking up a paycheck, or speaking to Thomas about a route or personal business.

More specifically going to Williams' role as a steward, Harris was a union steward for about 12 years ending in January 2009. I credit his uncontroverted testimony that he frequently came in to file a grievance when he was off duty, in order to

meet the contractual time limit; that he often filed for an extension of time to file a grievances; and that such extensions were filed before the actual grievance was filed.

January 29 Incident

Williams returned from vacation leave on January 29. The following facts are based on credited portions of Williams' and Brewers' accounts, in particular as corroborated by the credited testimony of the General Counsel's witnesses Rayborn and Young, and the Respondent's witness Stancy.

After clocking in at between 7:20 and 7:30 a.m., Williams went to see Brewer at her desk. After she assigned him his route for the day, he stated that he needed union time. She replied that he would have to fill out a particular form for that purpose. He tried unsuccessfully to find one and then returned to her desk. The two of them went to another desk and located one. She went back to her desk. About 5–10 minutes later, Williams returned with the completed form.²⁰

Brewer asked the purpose for the union time, and Williams replied, to file an informal step A grievance and for investigative purposes. She then asked who were the people filing and what the grievance was about. He replied that he had already said violations of the contract and was not aware of having to tell her anything else. She stated that he could not go on a "fishing expedition."²¹ He asked if she could show him where in the contract it stated that he had to give her additional information. She asked if he was trying to say that she did not know the contract. He replied that he did not think that she did. Raising her voice, Brewer stated that he had to tell her what the grievances were about, or she would not let him have time to file it. Williams replied that he was not Vanessa (Hotchkiss), so not to yell at him.²² Brewer said that she was giving him a direct order to go back to his case (workstation). He responded that a direct order applied to nonbargaining unit employees and not to him. At least once, she repeated that she was giving him a direct order, and he repeated his response. Williams moved in closer, said that he was not going to follow her order, and pointed his finger at her. Brewer got up from her desk and said that she was calling the police. She dialed 911.

Stancy testified that when he heard Brewer talk to Williams in a "forceful" voice, he turned and saw them standing face-to-face but "not real close—a couple of feet" as Williams pointed his finger at her, and Brewer made the phone call.²³ Thus, he only partially corroborated Brewer's version, bolstering his credibility, and I credit him.

Brewer testified that she called the police and had Williams removed because he pointed his finger in her face and refused three times a direct order to go to his case. There is no evidence that management has on any other occasion had the police remove an employee from the premises.

¹⁸ See GC Exh. 5.

¹⁹ Tr. 40.

²⁰ Jt. Exh. 1.

²¹ Tr. 281 (Brewer).

 $^{^{22}}$ Brewer conceded that she became "extremely loud" as the conversation progressed. Tr. 281.

²³ Tr. 391, 404–405.

After Brewer called the police, Williams returned to his case and cased (sorted) mail. As he was working, a police officer²⁴ approached him and told him that he had to leave the premises. Williams gathered his personal items, and the officer escorted him out of the building. Brewer did not leave with them. Williams went to his car in the parking lot and drove off. There is no direct evidence that he had any confrontation with the of-

Later on January 29, the Respondent issued Williams an emergency placement or suspension, 25 because:

You became confrontational and abusive and refused to follow my direct order to leave the premises. You were given a direct order to return to your case, and you refused three times while yelling in a threatening tone "I don't have to listen to you!" You continued yelling at me and you refused to leave until local police were called to escort you out of the building. You continued arguing with the police officer in the parking lot as well. Retaining you on duty could have resulted in being injurious to self or others. (Emphasis added.)

Williams did not return to work after January 29.

I credit Harris' uncontroverted testimony that, as a steward, he did not always tell the supervisor the specifics of the grievance, sometimes to protect the employee's identify; and that there was no rule that he had to do so.

January 31 Investigative Interview

An investigative interview took place at the facility on January 31. Brewer, Williams, Supervisor Moore, and Union Secretary Elise Foster were in attendance. Brewer's and Williams' accounts of the meeting were generally not inconsistent.

Brewer asked Williams a series of questions concerning his conduct on January 29. One of them was why he had disobeyed her instructions, to which he replied that he had understood she was giving him a direct order. Brewer also asked why he had engaged in threatening conduct toward her, to which he responded by asking what he had done or said that was threatening. She wrote down his answer but did not reply. During the course of the meeting, Williams said that he had questions that he wished to ask her. Brewer responded that she was the supervisor and would ask the questions, and would not answer his. Williams admitted that when Foster asked the spelling of Brewer's name, he replied, imprudently to say the least, "Like the yeast infection."20

February 13 Notice of Removal

Brewer made the decision to remove Williams, and the Respondent issued him a notice of removal dated February 13.27 The charge was failure to follow instructions/direct order, on January 29. The notice recited what occurred at the January 31 investigative interview and went on to state that Williams had violated a number of policies by, inter alia, not obeying orders, and engaging in violent and/or threatening behavior.

Three prior disciplinary actions were "taken into consideration."²⁸ The concluding paragraphs emphasized Williams' failure to follow instructions, more specifically a direct order.

The notice of removal is currently at the arbitration level of the grievance procedure.

January 29 Plan 5 Meeting

Brewer conducts ad hoc plan 5 meetings or service talks with carriers several mornings a week, on the floor, covering such matters as performance, new directives, safety issues, and special situations. Thomas normally speaks if she has something

I credit Harris, Hayes, and Williams that Thomas opened the January 29 meeting, over Thomas' testimony that Brewer did so and that she (Thomas) spoke only after the carriers were disrespectful and talked over Brewer.

I also credit their substantially similar testimony of what Brewer and Thomas stated at the meeting, finding them more credible than Brewer and Thomas for reasons already set forth.

The meeting was called at between 8 and 8:15 a.m., almost immediately after Williams was escorted out of the building. Thomas began by stating that there was a pyramid at the facility, with she at the top, the supervisors in the middle, and carriers at the bottom. She also stated that she could fire the carriers but that they could not fire her unless she put her hands on them; otherwise, there was nothing that they could do to her. Inasmuch as the General Counsel's witnesses differed on whether Thomas expressly mentioned the Union and/or Williams, I will give the Respondent the benefit of the doubt and find that she did not.

However, it is undisputed that Rayborn interjected by saying that there were two sides to every story, and what if a supervisor was wrong. Thomas replied by repeating her pyramid analogy and stating that she supported her supervisors. Tellingly, both Thomas and Brewer testified that they assumed Rayborn was referring to what had happened to Williams that morning.

Brewer took over from Thomas. She stated that the carriers wanted change, and now they were going to get changes; management was going to start to more strictly enforce the standard operating procedures by going by the book on such matters as uniforms and missing scans, and that employees would be written up for violations. The General Counsel's witnesses differed on whether Brewer expressly stated that management would be looking to find violations. Again, I will give the Respondent the benefit of the doubt and find that she did not.

In making the above findings, I also take into account the Respondent's previous acknowledgement that Thomas made the following statements at an August 17, 2012 service talk: she was the one with the power and would fire the persons who filed EEO claims, and because of the EEO claims, employees would no longer be allowed to sell cookies or candies on the workroom floor.²⁹

²⁴ Williams testified that there were two officers, but Brewer, Rayborn, and Young testified that there was one. I credit them. 25 GC Exh. 2.

²⁶ Tr. 89.

²⁷ GC Exh. 3.

²⁸ R. Exhs. 3–5, described earlier.

²⁹ GC Exh. 6 (February 8 arbitration award of Arbitrator Vicki Peterson Cohen) at 6-7. I have not relied on the arbitrator's negative assessment of Thomas' credibility in finding her credibility lacking.

The record reflects nothing other than the union election on January 17, at which Williams was elected steward, that would relate to the carriers wanting change.

Analysis and Conclusions

Williams' Removal from the Premises, Suspension, and Termination

When a respondent-employer defends disciplinary action based on employee misconduct that is part of the res gestae of the employee's protected activity, the Board typically analyzes the case under the four-factor test set forth in Atlantic Steel Co., 245 NLRB 814, 816 (1979), rather than using a Wright-Line analysis. Fresenius USA Mfg., Inc., 358 NLRB No. 138, slip op. at 5 (2012); Aluminum Co. of America, 338 NLRB 20, 22 (2002); Atlantic Steel Co., 245 NLRB 814 (1979). The rationale behind this is that there is an assumed causal connection between the protected activity of the employee and the discipline, and the pivotal issue is whether the employee's conduct was removed from the Act's protection under the criteria set out in Atlantic Steel Co., above. Aluminum Co. of America, id.; see also Atlantic Scaffolding Co., 356 NLRB No. 113, slip op. at 5 (2011); Phoenix Transit System, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

Here, it is undisputed that the basis for Williams' removal from the premises, suspension, and ultimate discharge was his allegedly threatening and insubordinate conduct when, in his capacity as steward, he attempted to present grievances to Supervisor Brewer on January 29. But for such conduct, the Respondent would have not taken any of those actions against him

Without question, the application of a collective-bargaining agreement's terms, and participation in the filing of grievances are protected activities. *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984); *Aluminum Co. of America*, above at 21. Indeed, the Board has long made clear that the grievance activities of union stewards are especially important to the effectiveness of contractual grievance-arbitration mechanisms. See, e.g., *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979); *Clara Borin Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976).

Accordingly, I conclude that an *Atlantic Steel Co.* analysis is the appropriate framework. Four factors are considered, and weighed in the aggregate: (1) the place of discussion; (2) the subject matter; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's ULP's.

As *Fresenius* indicates (slip op. at 6), if the place of discussion is one that is unlikely to disrupt production, i.e., a nonwork area, it favors continued protection. As another factor here, the Board considers whether the comments were made in the presence of other employees and, if so, the location factor is neutral. *Fresenius*, id.; *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322 fn. 20 (2006). Here, Brewer's desk was located on the workroom floor, and Williams acted in ac-

cordance with protocol to see her regarding an informal step A grievance(s). No other employees were in the immediate vicinity, and the evidence does not establish that the work of other employees was disrupted in any way. Weighing these factors, I conclude that the place of discussion was reasonable in the circumstances and weighs in favor of protection.

As to the subject matter, Williams' activity—seeking to discuss or file grievances on behalf of unit employees—went to the heart of collective bargaining. See the cases cited above. Thus, this factor weighs strongly in favor of continued protection.

The most important single element here is the nature of Williams' conduct as he engaged in protected activity, more precisely, whether it was "sufficiently egregious" to remove him from the Act's protection. See *Coca Cola Puerto Rico Bottlers*, 358 NLRB No. 129, slip op. at 3 fn. 12 (2012); *Stanford Hotel*, 344 NLRB 558, 558 (2005).

The Board draws a line between "cases where employees engaged in concerted actions that exceeded the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the conduct is so violent or of such character to render the employee unfit for further service." *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), citing *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). In *Kiewit*, the Board found protected remarks that were "intemperate" but simple, brief, and spontaneous reactions, distinguishing them from premeditated, sustained personal threats, or unambiguous or outright threats of personal violence. Id.; see also *Fresenius*, above at slip op. 6–7; *Beverly Health*, above at 1322–1323.

The Respondent raises two inter-related contentions in defending the disciplines it imposed on Williams: threatening behavior (approaching Brewer and shaking his finger at her) and insubordination (not returning to his workstation until after she ordered him three or four times to go there). There is no contention that Williams made any kind of physical contact with her, made verbal threats, or used obscenities.

I will first address what the Respondent avers was Williams' threatening behavior toward Brewer. In *Winston-Salem Journal*, 341 NLRB 124, 126 (2004), the Board determined that the conduct of an employee who cursed at a supervisor and "angrily pointed his finger at him" was not "so inflammatory as to lose the protection of the Act." The Board emphasized that the Act allows a certain degree of latitude to employees when engaged in otherwise protected activity even when they express themselves intemperately.

In *Stanford Hotel*, above at 559, the Board found that an employee calling a supervisor "a f—ing son of a bitch" while angrily pointing a finger at him weighed against protection. Nevertheless, other factors weighed in favor of protection, and the Board concluded that the employee's conduct was protected.

Finally, in *Plaza Auto Center, Inc.*, 355 NLRB 493, 497 (2010), the Board found, inter alia, that an employee's standing up and pushing aside a chair did not amount to a threatening gesture, even though the employee engaged in cursing and made a statement that if the owner fired him, he would regret it.

³⁰ As per *Wright Line*, 251 NLRB 1083 (1080), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Significantly, it is undisputed that Brewer spoke at least as loudly as Williams, probably even louder; that when he pointed at her, he was a couple of feet away from her and not directly face-to-face (credited testimony of Stancy); and that he did not threaten her verbally in any way. I doubt if Williams' conduct was threatening from an objective standard and, as noted, I am not convinced that Brewer felt as threatened as she portrayed at the trial. In any event, this aspect of his conduct fell far short of removing him from the Act's protection.

Turning to the Respondent's insubordination claim, the fact a steward was engaging in steward duties at the time of the incident does not prevent an employer from taking the same action in response to the employee's insubordination that it would have taken toward any employee committing similar insubordinate acts. *Postal Service*, 350 NLRB 441, 447 (2007); *Guardian Ambulance Service*, 228 NLRB 1127, 1131 (1977).

The Board distinguishes between "true insubordination" and behavior that is only "disrespectful, rude, and defiant." *Goya Foods, Inc.*, 356 NLRB No. 73, slip op. at 4 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee who initially refused a supervisor's instruction to punch out and go home, but then complied after a few minutes, was found to have engaged in the latter and, therefore, to fall under the Act's protection. See also *Noble Metal Processing, Inc.*, 346 NLRB 795 (2006). In reversing an ALJ, the Board in *Crown Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 5 (2011), found, inter alia, that employees' momentary refusal to return to work after presenting a petition did not cause them to lose the Act's protection.

In *Postal Service*, 251 NLRB 252 (1980), enfd. 652 F.2d 409 (5th Cir.1981), the employee was accused of using profane language and of insubordination, but the Board found his conduct protected, noting the absence of violence or abusive language or of an adverse impact on the work of other employees. Thus, the "temporary failure" of an employee to comply with an order to return to work after a heated exchange did not result in "insubordination" that caused him to lose the Act's protection, the Board concluding that such behavior did not rise to the level of "opprobrious or extreme." Id. at 252; see also *Sheraton Anchorage*, 359 NLRB No. 95, slip op. at 2 fn. 6 (2013).

In the instant case, Williams' refusal to immediately return to work occurred during his pursuit of trying to discuss grievances with Brewer, who flat out refused to do so. Significantly, he returned to his workstation immediately after she called 911 and made clear that their conversation was over. The Respondent cannot rely on the fact that Williams returned to work only after Brewer called the police, because I find that her calling 911 was wholly unjustified and a gross over-reaction to their argument

In sum, for the above reasons, the Respondent's insubordination defense also fails. I therefore conclude that the nature of Williams' conduct, although not necessarily exemplary, weighs in favor of protection.

The last factor is provocation by the employer's ULP's. This does not require that the employer's conduct be explicitly alleged as a ULP so long as the conduct evinces an intent to interfere with protected rights. *Network Dynamics Cabling, Inc.*,

351 NLRB 1423, 1429 (2007) (manager provoked employee by admonishing him to cease engaging in union activity); *Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004) (supervisor provoked union steward, who was seeking information relevant to possible discharge grievances, by his "complete: and "hostile" refusal to discuss the situation).

Here, Brewer's response to Williams was quite similar to that of the supervisor in *Overnite Transportation*. She admittedly knew that he was a new steward, presumably lacking in experience, but rather than trying to explain what he should do or offer to meet with him a later time, she summarily refused to talk to him and instead ordered him to go back to work. Especially in light of the antagonism that Brewer showed to him on January 25 when he approached her about grievance matters, I conclude that her conduct toward him on January 29 evinced an attitude of interfering with Williams' duties as a steward to investigate potential grievances and therefore amounted to provocation.

In summary, I conclude that all four *Atlantic Steel Co.* factors, individually and in the aggregate, weigh in Williams' favor, and that his behavior did not remove his conduct on January 29 from the protection of the Act. Accordingly, I further conclude that the Respondent violated Section 8(a)(3) and (1) by having the police remove him from the premises on January 29, suspending him on January 29, and terminating him on February 13.

The 8(a)(1) Allegations

1. Brewer's January 25 threat to call the police

On January 25, Williams asked Brewer if she would meet with him to file a grievance for a letter carrier, or grant him an extension because time was running out. In contrast to management's practice when Harris was a steward for 12 years, Brewer replied no, that she would do neither because he was on vacation and not on the clock and that he could not get an extension unless he had already filed the informal step A grievance—a rather nonsensical catch-twenty-two. When Williams persisted that she either meet with him or give him an extension, Brewer got up from her desk, approached him and Rayborn, and told them in a raised voice that she was giving them a direct order to leave, or she would call the police.

Especially noting that Brewer's treatment of Williams was inconsistent with management's past treatment of off-duty stewards and of stewards' requests for extensions of time, I conclude that her threat to call the police interfered with Williams' protected activities as a union steward and violated Section 8(a)(1). Cf. W. D. Manor Mechanical Contractors, Inc., 357 NLRB No. 128 (2011); Labor Ready, Inc., 327 NLRB 1055 (1999).

2. Statements made at the January 29 plan 5 meeting

a. Thomas

Of great import, the meeting took place very shortly after the police escorted Williams out of the facility; and Thomas opened the meeting, whereas Brewer usually conducted such meetings, with Thomas adding anything she wished to raise. Thomas began by stating that there was a pyramid at the facility, with she at the top, the supervisors in the middle, and carri-

ers at the bottom. She also stated that she could fire the carriers but that they could not fire her unless she put her hands on them; otherwise, there was nothing that they could do to her. Rayborn, the assistant steward, questioned what if the supervisor acted incorrectly, and Thomas replied that she backed up her supervisors.

Both Thomas and Brewer assumed that Rayborn was referring to Williams, and carriers reasonably would have construed Thomas' statements as related to Williams being removed from the premises because he had engaged in steward activities; there would have been no other explainable context for them. I have determined that such removal violated the Act.

Accordingly, I conclude that Thomas violated Section 8(a)(1) by impliedly threatening that the Respondent could have the police remove employees from the facility for engaging in union activity. See W. D. Manor Mechanical Contractors, Inc. and Labor Ready, Inc., above. Since Williams had not yet been discharged or otherwise disciplined at the time of this meeting, and Thomas' statements were clearly linked to his removal from the premises, I cannot conclude that she threatened employees in general with discharge for engaging in union activity. This contrasts with the express threats of discharge that she made at the August 17, 2012 service meeting concerning an EEO complaint against her.

b. Brewer

Brewer's reference to the carriers wanting change had to be interpreted as their electing Williams on January 17 to replace Hotchkiss as union steward, in the absence of anything else in the record indicating that they had recently voiced anything related to change other than replacing the union steward. When Brewer went on to say that because of that, management would more strictly implement rules and policies regulations, and would write employees up for violations, she in essence told employees that the Respondent would retaliate against them because they had elected Williams.

Accordingly, I conclude that Brewer violated Section 8(a)(1) by announcing stricter enforcement of rules and policies and threatening employees with discipline for violations, because they had elected Williams to be their union steward.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.
 - (a) Had police eject Darion Williams on January 29, 2013.
 - (b) Suspended Williams on January 29, 2013.
 - (c) Terminated Williams on February 13, 2013.
- 4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

- (a) Threatened employees with ejection from the facility by the police for engaging in protected union activity.
- (b) Announced more stringent enforcement of rules and policies because employees had elected a new union steward.
- (c) Threatened employees with discipline because they had elected a new union steward.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, the Respondent shall make Williams whole for any losses, earnings, and other benefits that he suffered as a result of the unlawful discipline imposed on him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Further, the Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and, if it becomes applicable, shall compensate Williams for any adverse tax consequences of receiving a lump-sum backpay award. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³¹

ORDER

The Respondent, United States Postal Service, Harvey, Illinois, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Having the police eject, suspending, terminating, or otherwise discriminating against employees for engaging in activities on behalf of the National Association of Letter Carriers Branch 11 (the Union).
- (b) Threatening employees with ejection from the facility by the police for engaging in activities on behalf of the Union.
- (c) Threatening employees with more stringent enforcement of work rules and policies and discipline for engaging in activities on behalf of the Union.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of the Board's Order, offer Darion Williams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

³¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (b) Make Darion Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision
- (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful ejection, suspension, and termination of Darion Williams, and within 3 days thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.
- (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facility in Harvey, Illinois, copies of the attached notice marked "Appendix."³² Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 25, 2013.
- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 13, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT have the police remove you from the facility, suspend, discharge, or otherwise discriminate against you because you engage in activities in support of the National Association of Letter Carriers Branch 11 (the Union).

WE WILL NOT threaten you that with being removed from the facility by the police, more stringent enforcement of work rules and policies, discipline, or any other adverse action because you engage in activities in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer Darion Williams full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Darion Williams whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to our unlawful police removal, suspension, and discharge of Darion Williams, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the removal, suspension, and discharge will not be used against him in any way.

UNITED STATES POSTAL SERVICE

³² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."